SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 577

JACK TRIMBLE, AND JOE TRIMBLE, BY HIS NEXT FRIEND, JACK TRIMBLE.

Petitioners,

vs.

ZACH JUSTICE AND K. L. ARNOLD, EXECUTORS AND TRUSTEES, ET AL.

BRIEF FOR PETITIONERS.

MAY IT PLEASE THE COURT:

Opinions Below.

The judgment of the Pike Circuit Court is found R. Vol. I, page 120.

The first opinion of the Court of Appeals of Kentucky (whole court sitting), reversing the Pike Circuit Court in part, is not and will not be published in the reporters, and is found R. Vol. II, page 135.

The second opinion of the Court of Appeals of Kentucky, affirming the Pike Circuit Court judgment, is found in 173 S. W. (2) 985, Vol. 8 S. W. Advance Sheets dated October 19, 1943, and R. Vol. II, page 153. The minority dissenting opinion is in and at the end of the opinion which became final Oct. 5, 1943.

Jurisdiction.

A statement as to the jurisdiction appears in our petition for certiorari, and the exhibits attached.

Statement of the Case

1. James Hatcher died testate, a citizen of Pike County, Kentucky, September 29, 1939.

2. He died seized and possessed of a net estate of $352,939.29, R. Vol. I, p. 93.

3. His artificial, gross estate amounted to $486,801.33 when the value of gifts made in contemplation of death were included, R. Vol. I, p. 92.

4. The gross estate included the value of a gift by deed dated October 6, 1938, from James Hatcher to Jack Trimble and Joe Trimble jointly for life with remainder over (the whole title) of the James Hatcher residence and total property in Pikeville (R. Vol. I, p. 5) valued at $110,000.00

and it included gifts to the four Trimble girls and others by deeds to them for life with remainder over (the whole title) to property situated in Pikeville, and it included to them and others cash money delivered (R. Vol. I, p. 5), amounting to 63,176.00

in all $173,176.00

5. The tax on the estate after deductions (R. Vol. I, p. 94) amounted to $61,036.60
of which sum the executors have paid 14,981.10

leaving unpaid a balance of $46,055.50

The Federal Statute.

The Act of Congress of February 10, 1939, imposes the estate tax and provides for the assessment thereof. The act imposes the tax upon the estate passing at death, and provides the value of property transferred by gift before death, determined to be in contemplation of death, shall be included in the gross estate, reserving liens as security for the payment of the tax. To this point there is no controversy in this case.

The Federal statute provides the *executor* of the estate shall pay the tax, Title 26, U. S. C. A. 822(b). This means the tax must be paid from the estate passing at death to the executor, here $313,625.33 (R. Vol. I, p. 10). The statute provides when the executor has paid the tax the Commissioner shall issue to the executor duplicate receipts showing the payment of the tax, and enjoins all courts in auditing and settling the estate to give full faith and credit to the receipt, Title 26, U. S. C. A. 823.

It seems clear, when the tax is paid, as provided by the Federal statute, the executor and estate are relieved of further liability; that the executor has acquired no rights, but has only discharged a duty under the Federal statute. The discharge of the executor by the full payment of the tax discharges the debt due the Federal government and any liens or obligations of persons receiving gifts made by the decedent in contemplation of death. This has been the contention of the petitioners in the Pike Circuit Court in their pleadings and briefs in the Court of Appeals of Kentucky. The Pike Circuit Court and the Court of Appeals of Kentucky failed to recognize the effect of the discharge of the debt, and assume and adjudge erroneously the executors have acquired the right of subrogation from the sovereign to be reimbursed as executors or trustees from petitioners Jack and Joe Trimble in the

amount of $14,823.51 (R. Vol. I, p. 122). The language of the Federal statute means the executors and the estate are discharged from all liability on account of the Federal Estate tax when paid. This would be true if James Hatcher had died intestate.

James Hatcher's Will.

James Hatcher by his will (R. Vol. I, p. 16), duly published and probated, directed:

1. His trustees (executors) to pay his "debts." Petitioners claim this includes the Federal Estate tax. Taxes have been held to be debts, *Price* v. *U. S.*, 269 U. S. 492, 70 L. Ed. 373; *Hatch* v. *Morosco Holding Co., Inc.*, 61 Fed. 944; *Breete, et al.* v. *Hill, et al.*, 293 Ky. 526, 169 S. W. (2) 632; and in fact it is a debt arising by the imposition of the tax by the sovereign.

2. His trustees (executors) to borrow money and mortgage his trust estate therefor, for the purpose of paying "any United States Government, County and State, including income and inheritance, taxes levied or assessed against my said estate left by me by this will" (R. Vol. I, p. 29).

3. He further authorizes, empowers and directs that "out of the income from the trust property that the trustees pay all taxes on all of the property which I may own at the time of my death *whether the same be part of this trust estate or not*, also to pay all taxes on that property deeded by me to the Trimble Children and Hatcher Children on Ivy and Caney Creeks, alone, and this shall continue throughout the existence of the ten year trust only. The taxes mentioned in this paragraph shall be paid without charging any of the trust property."

4. The trustees shall at least twice a year for the first ten year period, on the first day of January and July

each year, after having paid all expenses, *taxes*, repairs and allowances as herein provided for; distribute equally the balance of the income from the trust estate.

5. He expressly provided "when and if the income of my trust estate, after the expiration and settlement of the first trust of ten years, ever becomes insufficient to pay the taxes" and other necessary expenses directed by the will during the thirty-five year trust period, and at the same time leave a substantial sum sufficient to be distributed, "that then and in that event * * * the beneficiaries may petition my trustee for discontinuance of the second thirty-five years trust under my will."

Every time taxes are mentioned the provisions repeatedly direct they are to be paid from his trust estate, which is the estate that passed to his executors and trustees at the moment of his death. The will expressly directs the taxes shall be paid by the executors and trustees, who are the same persons.

The Federal statute provides for the payment of the estate taxes by the executor to the Collector from the estate passing at death, Title 26, U. S. C. A., section 822 (b):

> "The tax imposed by this subchapter shall be paid by the executor to the Collector."

The Federal act allows the testator to provide where the burden of the Federal Estate tax shall rest, and petitioners contend James Hatcher availed himself of that privilege and placed the burden upon his trust estate. Petitioners earnestly insisted neither the Pike Circuit Court nor the Court of Appeals of Kentucky have any right to ignore the Federal Statute or his will or its provisions by erroneously construing in effect it authorized the executors to purchase from the Federal Government a portion of the estate taxes paid, and claim it as a debt against petitioners. It seems they have ignored petitioners' right of immunity from the

burden of debt, estate taxes, and by fiat placed upon the property given to Jack and Joe Trimble, a burden amounting to more than $14,000.

The Fourteenth Amendment of the United States Constitution provides no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Federal Estate tax law provides by section 826(c) the executor may collect a proportionate share of the tax from a beneficiary of life insurance which is included in the gross estate, and section 826(d) authorizes similar procedure against one receiving property subject to a power which is taxable. These sections deal with property which does not pass through the executor's hands. In the case at bar the gift property does not pass through the executors' hands. Congress has invaded this field and directed in what instances the beneficiary of property not passing through the hands of the executors shall contribute to the payment of the tax. Having entered this field and designated two classes that should pay, it follows all other classes in this field were intended to be free from the burden where there was sufficient estate in the hands of the executor to pay the tax. *Riggs* v. *Del Drago, et al.*, 63 S. Ct. 109, U. S. Advance Sheets. The judgments of the Courts of Kentucky compelling contribution from this class of donees, beneficiaries, is an invasion of the field entered by Congress, and it is beyond the power of the States to so act. Congress' entry into this field has preempted to the Congress the right to designate what classes in this field shall contribute. This confers jurisdiction upon this Court.

We submit this Court has jurisdiction of this appeal as the courts of Kentucky have misconstrued the Federal

statutes and violated the provisions of the Sixth Article and Fourteenth Amendment of the Constitution of the United States. We respectfully request a writ of certiorari be granted directed to the Court of Appeals and to the Pike Circuit Court, Kentucky.

Respectfully submitted,

J. SMITH HAYS,
WILLIAM HAYS,
Counsel for Petitioners.

Dated at Winchester, Kentucky, December 31, 1943.

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